



FILED

Mar 11 2008, 10:41 am

Kevin L. Smith

CLERK
of the supreme court,
court of appeals and
tax court

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REANNA FRYE b/n/f DORETHA
LEE-TUTSON and DORETHA
LEE-TUTSON,

VS.

No. 71A03-0708-CV-379

Appellees-Defendants.

March 11, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

ReAnna Frye b/n/f Dorthea Lee-Tutson and Dorthea Lee-Tutson (collectively, the Appellants) appeal the trial court's grant of summary judgment to the City of South Bend (the City) d/b/a Erskine Municipal Golf Course (the Golf Course), South Bend Parks and Recreation (the Parks Department), and South Bend Fire Department (the Fire Department) (collectively, the City Defendants). The Appellants present the following consolidated and restated issue for review: Did the trial court err in granting the City's summary judgment motion on the Appellants' claims of negligence and intentional infliction of emotional distress?

We affirm.

The Golf Course is owned and operated by the City through the Parks Department. The Golf Course is surrounded by a fence and has three entrances. The Golf Course is open for golf from around March 15 to December 1. The Golf Course is closed during the winter, which is indicated by signage, but the course can be accessed from the front entrance parking lot near the clubhouse and pro shop. For the past twenty-five years, the City has been aware that people have come onto the Golf Course during the winter and used it for walking dogs, cross country skiing, and sledding. Sledding was allowed at the Golf Course, but the City did not have a sledding policy. Golf course employees have discussed sledding during staff meetings and have tried to prevent sledders from entering the course's greens by staking and roping off four of the greens. The City has previously

posted “sledding at your own risk” signs near the front entrance parking lot and on the fence near the number seven green, but these signs were pulled down each year by vandals. *Appellants’ Appendix* at 70-71.

On January 19, 2004, ReAnna, who was then twelve years old, went with her then twenty-year-old brother, Ricardo Kingsbury, and some friends to the Golf Course to go sledding. ReAnna did not pay a fee to go sledding at the Golf Course, and there were no signs welcoming sledders. On ReAnna’s last run down the hill, she slid down the hill while lying on her stomach on an inner tube. As she approached the end of the hill, her inner tube veered to the left and hit a tree.

Paramedics from the Fire Department, Todd Skwarcan and David Scott, were dispatched to the Golf Course for a sledding accident on a “standard run” dispatch—that is, no lights or sirens. *Id.* at 101. The paramedics parked at the back maintenance entrance of the Golf Course and encountered a lady in Ricardo’s Geo Tracker, who drove down the hill to where ReAnna was lying. The paramedics could not drive their ambulance or take all their equipment down the snow-covered hill, so Skwarcan walked down the hill, while Scott remained with the ambulance so Skwarcan could radio to him after he assessed the situation.

Once Skwarcan got to the bottom of the hill, he saw ReAnna lying on the ground covered in extra coats and blankets. Skwarcan conducted an initial assessment to check her airway, breathing, circulation and then palpated her long bones, pelvis, and collar bone to rule out a C-spine injury. ReAnna did not have any neck or back pain, but she did complain of pain on her left side. Skwarcan did not want to undress ReAnna because

of the snow and cold, but he examined her left abdomen and saw no bruising. When Skwarcan pushed on ReAnna's abdomen, she complained of localized pain. Because ReAnna had no obvious signs of fractures, no loss of consciousness, and no bruising, Skwarcan did not initially believe that ReAnna had a serious injury. Skwarcan reported this initial belief to Ricardo and told him that ReAnna still needed to be seen at the hospital for x-rays. ReAnna claims that Skwarcan said she "fine" and was "faking."¹ *Id.* at 30, 83.

Skwarcan tried to determine how he was going to get ReAnna out of the sledding area and up the hill to the ambulance. Driving the ambulance down the hill or bringing a gurney down the hill were not options because of the snow. Skwarcan—determining that it was not safe for the paramedics to try to carry ReAnna up a snowy, icy hill and not wanting to wait extra time for additional personnel to arrive with a stokes basket—suggested putting ReAnna in the Geo Tracker to get her to the top of the hill. ReAnna was put into the Tracker, and Ricardo took her to the hospital.² ReAnna was later transported by helicopter to Riley Children's Hospital, and as a result of her injuries, she lost use of one of her kidneys.

¹ This fact is disputed. When asked if he remembered telling ReAnna that she was faking, Skwarcan replied, "No. I couldn't make that determination." *Appellants' Appendix* at 107. When Ricardo was asked if he heard Skwarcan say that ReAnna was faking, he said, "Yes. It - - it was in - - it was an assumption he made, but yes, he did inform me that he didn't think it was that serious." *Id.* at 95. For the purposes of summary judgment on the intentional infliction of emotional distress claim, the trial court assumed that Skwarcan told ReAnna that she was faking.

² The facts relating to who helped put ReAnna in the Tracker and to who decided to take ReAnna to the hospital in the Tracker are also disputed. Skwarcan claims that he helped put ReAnna in the Tracker and that Ricardo told Skwarcan that he would take ReAnna to the hospital since she was already in the car. ReAnna claims that Skwarcan did not help put her in the Tracker and that Ricardo offered to take her to the hospital. Ricardo did not remember if Skwarcan helped get ReAnna in the Tracker and thought that Skwarcan believed that they had refused the ambulance.

In January 2006, the Appellants filed a complaint against the City Defendants, alleging negligence and intentional infliction of emotional distress. In February 2007, the Appellants filed a motion for partial summary judgment. The Appellants argued that the trial court should grant partial summary judgment on the elements of duty and breach of duty of their negligence claim. They argued that the City owed ReAnna a duty as a public invitee and that the City breached that duty by failing to prevent sledders from entering areas of the Golf Course that were potentially dangerous due to the number of trees located there. On their intentional infliction of emotional distress claim, the Appellants argued that partial summary judgment should be granted in their favor because the paramedic's act of telling ReAnna she was faking constituted extreme and outrageous conduct as a matter of law.

The City responded to the Appellants' motion and filed a cross-motion for summary judgment. The City argued it was entitled to summary judgment on the negligence claim because it was exempted from liability under the Indiana Recreational Use Statute (IRUS), Ind. Code Ann. § 14-22-10-2 (West, PREMISE through 2007 1st Regular Sess.). The City argued that the IRUS was applicable because ReAnna was a licensee, not a public invitee, and because there was no attractive nuisance. In regard to the intentional infliction of emotional distress claim, the City argued that the Appellants had failed to show that the paramedic's conduct was extreme and outrageous or that ReAnna had suffered severe emotional distress.

The Appellants responded to the City's summary judgment motion and argued that the IRUS did not apply to shield the City from liability because ReAnna was a public

invitee and because the sledding hill at the Golf Course constituted an attractive nuisance. The Appellants also argued that the paramedic's statement was, as a matter of law, extreme and outrageous.

The trial court held a hearing on the parties' summary judgment motions and in July 2007, issued an order denying the Appellants' motion for partial summary judgment and granting the City's motion for summary judgment on the Appellants' claims of negligence and intentional infliction of emotional distress. In regard to the negligence claim, the trial court determined that the IRUS applied because ReAnna "was a licensee and not an invitee on the day of her injury at [the] Golf Course" and because "[t]he natural conditions at [the] Golf Course on the day of Re[A]nna's injury did not constitute an attractive nuisance." *Id.* at 9. In regard to the intentional infliction of emotional distress claim, the trial court determined that even assuming the paramedic told ReAnna she was faking, this statement was not, as a matter of law, extreme and outrageous conduct. The trial court also concluded summary judgment was appropriate on this claim because there was no designated evidence showing severe emotional distress to ReAnna.

The Appellants argue the trial court erred by granting the City's motion for summary judgment on their claims of negligence and intentional infliction of emotional distress. Our standard of review for a trial court's grant of a motion for summary judgment is well settled:

Summary judgment is appropriate only where the evidence shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. A party seeking summary judgment bears the burden of making a prima facie showing that there are no genuine issues of material fact and that the party is entitled to judgment

as a matter of law. A factual issue is “genuine” if it is not capable of being conclusively foreclosed by reference to undisputed facts. Although there may be genuine disputes over certain facts, a fact is “material” when its existence facilitates the resolution of an issue in the case.

When we review a trial court’s entry of summary judgment, we are bound by the same standard that binds the trial court. We may not look beyond the evidence that the parties specifically designated for the motion for summary judgment in the trial court. We must accept as true those facts alleged by the nonmoving party, construe the evidence in favor of the nonmovant, and resolve all doubts against the moving party. On appeal, the trial court’s order granting or denying a motion for summary judgment is cloaked with a presumption of validity. A party appealing from an order granting summary judgment has the burden of persuading us that the decision was erroneous.

A grant of summary judgment may be affirmed upon any theory supported by the designated evidence. While the trial court here entered specific findings of fact and conclusions of law in its order granting summary judgment for the appellees, such findings and conclusions are not required and, while they offer valuable insight into the rationale for the judgment and facilitate our review, we are not limited to reviewing the trial court’s reasons for granting or denying summary judgment.

Van Kirk v. Miller, 869 N.E.2d 534, 539-40 (Ind. Ct. App. 2007) (citations omitted), *trans. denied*. The fact that the parties filed cross-motions for summary judgment does not affect our standard of review. *Turner v. Boy Scouts of America*, 856 N.E.2d 106 (Ind. Ct. App. 2006). When the defendant is the moving party, the defendant must show that the undisputed facts negate at least one element of the plaintiff’s cause of action. *Dible v. City of Lafayette*, 713 N.E.2d 269 (Ind. 1999).

We first address the Appellants’ contention that the trial court erred by granting the City’s motion for summary judgment on their negligence claim. Specifically, the Appellants argue that the trial court erred by ruling that the IRUS shielded the City from liability on the negligence claim.

The purpose of the IRUS is to encourage landowners to open their property to the public for recreational purposes free of charge. *McCormick v. State, Dep't of Natural Res.*, 673 N.E.2d 829 (Ind. Ct. App. 1996). The IRUS provides, in part:

(d) A person who goes upon or through the premises, including caves, of another:

(1) with or without permission; and

(2) either:

(A) without the payment of monetary consideration^[3]; or

(B) with the payment of monetary consideration directly or indirectly on the person's behalf by an agency of the state or federal government;

for the purpose of swimming, camping, hiking, sightseeing, or any other purpose (other than the purposes described in section 2.5 of this chapter) does not have an assurance that the premises are safe for the purpose.

(e) The owner^[4] of the premises does not:

(1) assume responsibility; or

(2) incur liability;

for an injury to a person or property caused by an act or failure to act of other persons using the premises.

(f) This section does not affect the following:

(1) Existing Indiana case law on the liability of owners or possessors of premises with respect to the following:

(A) Business invitees in commercial establishments.

³ "Monetary consideration" is defined as "a fee or other charge for permission to go upon a tract of land." I.C. § 14-22-10-2(b).

⁴ An "owner" includes a "governmental entity" such as a city. See I.C. §§ 14-22-10-2(a) and (c).

(B) Invited guests.

(2) The attractive nuisance doctrine.

I.C. § 14-22-10-2. In other words, subject to the exceptions listed in the statute (such as an attractive nuisance), the IRUS excuses an owner from liability to persons (other than business invitees and invited guests) using the property for recreational purposes (such as sledding) without pay of monetary consideration, whether the injury is caused by the condition of the land or by another recreational user. *See Kelly v. Ladywood Apartments*, 622 N.E.2d 1044 (Ind. Ct. App. 1993), *trans. denied*.

The Appellants argue the IRUS was not applicable to excuse the City from liability because ReAnna was an invited guest, i.e., a public invitee, and because the hill at the Golf Course was an attractive nuisance. We first address the Appellants' contention that ReAnna was a public invitee and not an licensee when sledding at the Golf Course.

We have previously addressed the differences between an invitee and a licensee in *McCormick v. State, Dep't of Natural Res.*, 673 N.E.2d 829. There, we explained that “[a] public invitee is a person who is *invited* to enter or remain on another’s land for a purpose for which the land is held open to the public but a licensee is privileged to enter or remain on the land by virtue of *permission* or *sufferance*.” *Id.* at 836 (citations omitted). When determining whether an individual is an invitee or a licensee, the distinction between the terms “invitation” and “permission” becomes critical. *McCormick v. State, Dep't of Natural Res.*, 673 N.E.2d 829. To help clarify this distinction, we looked to the comments of the Restatement (Second) of Torts:

The comments to Restatement (Second) of Torts § 330 provide that:

c. *Consent and toleration.* The word “consent,” or “permission,” indicates that the possessor is in fact willing that the other shall enter or remain on the land, or that his conduct is such as to give the other reason to believe that he is willing that he shall enter, if he desires to do so.

The comments to Restatement (Second) of Torts § 332 clarify the distinction between invitation and permission:

b. *Invitation and permission.* Although invitation does not in itself establish the status of an invitee, it is essential to it. An invitation differs from mere permission in this: an invitation is conduct which justifies others in believing that the possessor desires them to enter the land; permission is conduct justifying others in believing that the possessor is willing that they shall enter if they desire to do so.

* * * * *

Mere permission, as distinguished from invitation, is sufficient to make the visitor a licensee, as stated in § 330; but it does not make him an invitee

The comments to the same section of the Restatement clarify what is meant by land held open to the public for purposes of the public invitee:

d. *Land held open to the public.* Where land is held open to the public, there is an invitation to the public to enter for the purpose for which it is held open. Any member of the public who enters for that purpose is an invitee

* * * * *

It is not enough, to hold land open to the public, that the public at large, or any considerable number of persons, are permitted to enter at will upon the land for their own purposes. *As in other instances of invitation, there must be some inducement or encouragement to enter, some conduct indicating that the premises are provided and intended for public entry and use, and that the public will not merely be tolerated, but is expected and desired to come.* When a landowner tacitly permits the boys of the town to play ball on his vacant lot they are licensees only; but if he installs playground equipment and posts a sign saying that the lot is open free to all children, there is then a public invitation, and

those who enter in response to it are invitees.

McCormick v. State, Dep't of Natural Res., 673 N.E.2d at 837. Thus, the “decisive factor with regard to whether the possessor has extended an ‘invitation’ or ‘permission’ is the interpretation which a reasonable man would put upon the possessor’s words and actions given all of the surrounding circumstances.” *Id.* (citations omitted).

Here, the designated evidence shows ReAnna and her brother entered the Golf Course without paying a fee and used the Golf Course for sledding purposes when it was closed during the winter season. The closure of the Golf Course during the winter is indicated by signage, but the course can be accessed from the front entrance parking lot near the clubhouse and pro shop. The City was aware that people used the Golf Course during the winter for recreational purposes, such as for walking dogs, cross country skiing, and sledding. The City allowed sledding at the Golf Course but tried to prevent sledders and others from going upon the course’s greens by staking and roping off four of the greens. The City did not have any signs inviting the public to come sledding at the Golf Course and had previously posted “sledding at your own risk” signs near the front entrance parking lot and on the course. *Appellants’ Appendix* at 70-71.

Based on the designated evidence, no reasonable person could conclude that the City extended an invitation to ReAnna to use the Golf Course to go sledding. The evidence supports the inference that the City was indeed willing to let ReAnna and other sledders enter and remain upon the Golf Course or that the City, at least, gave ReAnna reason to believe that the City permitted her to enter upon her own desire to do so. There is no evidence from which one could reasonably conclude that the City desired, induced,

or encouraged ReAnna or other people to enter the Golf Course to go sledding. To the contrary, the actions of the City roping off greens and putting up warning signs of “sledding at your own risk” indicates that the City merely tolerated sledding and other winter-related activities upon the Golf Course. Therefore, the trial court did not err when it determined that ReAnna was a licensee, not an invitee.

We next address the Appellants’ argument that the IRUS was not applicable to shield the City from liability because the hill at the Golf Course was an attractive nuisance. The Appellants contend that the snow-covered sledding hill that contained trees on the sides at the bottom of the hill was an attractive nuisance because it was attractive to children and because the “quality or power of the hill in question to cause harm was hidden until it was exposed by [ReAnna’s] injury[.]” *Appellants’ Brief* at 14.

The attractive nuisance doctrine recognizes that a child may be incapable of understanding and appreciating the dangers that the child may encounter on a landowner’s premises. *Carroll by Carroll v. Jagoe Homes, Inc.*, 677 N.E.2d 612 (Ind. Ct. App. 1997), *trans. denied*. The doctrine applies where several elements are met: (1) the problem complained of must be maintained or permitted upon the property by the owner; (2) it must be peculiarly dangerous to children, and of such a nature that they will not comprehend the danger; (3) it must be particularly attractive to children; (4) the owner must have actual or constructive knowledge of the condition, and that children do or are likely to trespass, and to be injured; and (5) the injury must be a foreseeable result of the wrong. *City of Indianapolis v. Johnson*, 736 N.E.2d 295 (Ind. Ct. App. 2000). The

doctrine, however, is limited to cases where the danger is latent, and it does not apply to conditions, natural or artificial, which are common to nature. *Id.*

Here, the hill—and indeed the snow and trees—were not latent, and they are conditions common to nature. Therefore, the attractive nuisance doctrine is not applicable. *See, e.g., id.* (explaining that a pond is not latent and is a condition common to nature); *Cunningham v. Bakker Produce, Inc.*, 712 N.E.2d 1002 (Ind. Ct. App. 1999) (holding that limbs lying in a field, no matter whether they fell or were cut down, did not trigger the attractive nuisance doctrine because the doctrine did not apply to either natural or artificial conditions found in nature), *trans. denied*.

In summary, because ReAnna was a licensee and because the attractive nuisance doctrine does not apply, the trial court did not err in determining that the IRUS was applicable and granting summary judgment to the City on the Appellants' negligence claim.

The Appellants also argue that the trial court erred by granting the City's motion for summary judgment on their intentional infliction of emotional distress claim. The Appellants contend that summary judgment was inappropriate, in part, because the paramedic's act of telling ReAnna she was fine and faking constituted extreme and outrageous conduct as a matter of law.

In *Cullison v. Medley*, our Supreme Court adopted the tort of intentional infliction of emotional distress and described it as "extreme and outrageous conduct [that] intentionally or recklessly causes severe emotional distress to another." *Cullison v. Medley*, 570 N.E.2d 27, 31 (Ind. 1991) (quoting Restatement (Second) Of Torts § 46

(1965)). The intent to harm emotionally constitutes the basis of the tort. *Cullison v. Medley*, 570 N.E.2d 27. The elements of the tort are that a defendant (1) engages in extreme and outrageous conduct that (2) intentionally or recklessly (3) causes (4) severe emotional distress to another. *Lachenman v. Stice*, 838 N.E.2d 451 (Ind. Ct. App. 2005), *trans. denied*. “The requirements to prove this tort are rigorous.” *Branham v. Celadon Trucking Servs., Inc.*, 744 N.E.2d 514, 523 (Ind. Ct. App. 2001) (citations and internal quotations omitted), *trans. denied*.

“Liability for intentional infliction of emotional distress is found only if there is extreme and outrageous conduct.” *Bradley v. Hall*, 720 N.E.2d 747, 752 (Ind. Ct. App. 1999). In describing what constitutes extreme and outrageous conduct, we have cited with approval the following comment:

d. *Extreme and outrageous conduct*. The cases thus far decided have found liability only where the defendant’s conduct has been extreme and outrageous. It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by “malice,” or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, “Outrageous!”

Id. at 752-53 (quoting Restatement (Second) Of Torts § 46). In other words, intentional infliction of emotional distress is found where conduct exceeds all bounds usually tolerated by a decent society and causes mental distress of a very serious kind. *Branham v. Celadon Trucking Servs., Inc.*, 744 N.E.2d 514. What constitutes extreme and

outrageous conduct depends, in part, upon prevailing cultural norms and values. *Id.* In the appropriate case, the question can be decided as a matter of law. *Id.*

Here, considering the facts in the light most favorable to the Appellants as the non-moving party and assuming that the paramedic told ReAnna that she was fine and faking, we can conclude as a matter of law that the paramedic's conduct does not constitute "outrageous" behavior as contemplated by the narrow definition adopted from the Restatement. In other words, however insensitive the paramedic's comment may have been, we cannot say that it was so extreme in degree as to go beyond all possible bounds of decency or can be regarded as atrocious and utterly intolerable in a civilized society. As this Court has observed: "The law does not provide a remedy for every annoyance that occurs in everyday life. Many things which are distressing or may be lacking in propriety or good taste are not actionable." *Branham v. Celadon Trucking Servs., Inc.*, 744 N.E.2d at 518 (citations omitted). Such is the case here. The trial court did not err in granting the City's motion for summary judgment on the Appellants' claim for intentional infliction of emotional distress.

Judgment affirmed.

MATHIAS, J., and ROBB, J., concur.